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No. 81-5321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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Questions Presented

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the killings was given inadequate consideration and inadequate weight by the Florida courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

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REPLY BRIEF FOR PETITIONER

Respondent's brief necessitates reply. It distorts the issues by misconceiving (A) petitioner's constitutional contentions, (B) the application of those contentions to the operation of Florida's capital-sentencing statute, and (C) the

application of those contentions and of that statute to the facts and proceedings in this case.

A. Respondent Misconceives Petitioner's Legal Contentions

Respondent repeatedly ascribes to petitioner an argument which would erect a "bright line rule" for capital-sentencing determinations that is somehow inconsistent with particularized consideration of the facts of each individual case in which the death penalty is in issue. E.g., Resp. Br. 28-33. Petitioner makes no such argument. Earl Enmund's case necessarily presents the question of the minimum state of culpability that can support a death sentence conforming to the Eighth and Fourteenth Amendments' command of proportionality in capital sentencing. At or above that minimum state, capital punishment may and must be individualized. E.g.,

Eddings v. Oklahoma, ___ U.S. ___, 50 U.S. L.W. 4161 (January 19, 1982). Below that minimum state, capital punishment is forbidden. Coker v. Georgia, 433 U.S. 584 (1977).

This latter prohibition is not petitioner's invention. Coker established it upon abundant Eighth Amendment authority. See cases cited in Petr. Br. 10-11. Unless Coker is overruled, and unless the Eighth and Fourteenth Amendments are held to permit a death sentence for petty larceny or vehicular homicide, some line must be drawn between degrees of culpability for which the States can and cannot inflict the punishment of death.[1/] A

1/ In the midst of its attack on "bright lines," respondent at one point suggests its own such demarcation: between homicidal and nonhomicidal crimes. Resp. Br. 36-37. As the vehicular homicide example suggests, and as the analysis in Petr. Br.

[Footnote 1/ continues on next page.]

"brighter" line would seem better than a "murkier" one for this purpose, so that reviewing courts need not make a de novo judgment upon each death sentence. But, in any event, petitioner contends that the facts of his case fail to establish the minimum state of culpability required by the Eighth Amendment for a death sentence either (a) under the relatively bright-line principle convincingly articulated in Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 624-25 (1978),[2/] or (b) under any proper individualized con-

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1/ continued

16-17 demonstrates, such a line is inconsistent with the "objective indicators of society's 'evolving standards of decency'" (Coker v. Georgia, supra, 433 U.S. at 603 (Justice Powell, concurring)).

2/ We say relatively bright-line because of the substantial flexibility available to legislators in framing, and triers of fact

sideration of the relevant facts and circumstances shown by the record here.[3/]

2/ continued

in applying, intent-based standards. See Petr. Br. 44 n.64.

As we note in our opening brief, the constitional rule might be limited to three objective factors whose absence here distinguishes this case from almost every other case in which a death penalty has been imposed in this country over the past decade: (i) physical participation in the lethal act; (ii) presence at the site of the act, and (iii) participation in a plot to kill, if absent. Petr. Br. 36 n.55. See Appendix E to Petr. Br. (separately bound). Such a rule would be narrower, but it would require factual determinations less common in the criminal law of the various States than a simple determination, required in some well-established form by the criminal codes of all fifty States, of whether the defendant had a conscious purpose to kill.

3/ Respondent is of two minds about the individualized consideration due the relevant circumstances of Earl Enmund's case. At one point, Florida grudgingly concedes that "the fact that it was not proved that Petitioner intended the murders to occur might be relevant in mitigation."

[Footnote 3/ continues on next page.]

This major misconception of petitioner's argument is embroidered by a number of minor ones. First, petitioner has not "argued that ... the death penalty

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3/ continued

Resp. Br. 9. This much and more, of course, is established by Lockett v. Ohio, supra, which reversed the death sentence of a felony-murder accessory -- who proposed and assisted in planning the robbery, offered to secure a weapon to use in carrying it out, drove the getaway car, and hid the murder weapon and two of her accomplices from the police, 438 U.S. at 590-91 -- because her limited participation in the homicide itself, and her lack of an intent to kill, had not been considered in mitigation. Id. at 604.

Elsewhere, however, respondent approvingly acknowledges "the Florida courts' findings of the inapplicability of any mitigating circumstances" in petitioner's case. Resp. Br. 65 (emphasis added).

Respondent cannot have it both ways. It cannot argue that individualized mitigating consideration of the lack of an intent to kill and of nonparticipation in the lethal act is sufficient to make a death sentence imposed in such circumstances constitutional, and then turn around and argue that those factors are somehow devoid of "any mitigating" weight in petitioner's case. See Petr. Br. 47-49.

has not often been imposed in a felony-murder context." Resp. Br. 49. Petitioner has argued and demonstrated that the death penalty has infrequently been imposed upon offenders who neither took life, attempted to take life, or intended to take life, and whose guilt of first-degree murder was therefore established solely under the felony-murder rule. Petr. Br. 32-36; Apendices D and E. Petitioner's argument would not make the death penalty unavailable to the States in felony-murder cases, or even forbid the States to consider the fact of felony-murder as an aggravating circumstance in cases meeting the minimum level of culpability for a constitutional death sentence. Respondent's page 49, footnote 10 thereon, and Appendix thereto, referring to death sentences meted out in Florida for killings in "a felony-murder context" (Resp. Br.

49), are all simply wide of the mark.[4/]

The same misconception animates respondent's analysis of the various state statutes which it categorizes in footnote 8 at pages 43-45. Respondent asks the wrong questions about these statutes,[5/] and gets

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4/ In each case cited by respondent in its appendix--save, of course, petitioner's--the defendant either took life or was actually present aiding and abetting a codefendant who took life. See Petr. Br. Appendix E. While an intent to take life is, of course, not required under Florida law either to convict a defendant of first-degree murder or to sentence him to die, the fact is that in the vast majority of the "felony-murder context" cases cited by respondent in its appendix, unlike petitioner's case, the Florida Supreme Court either expressly found, or expressly affirmed the trial court's or jury's finding, that the defendant intended that life be taken. The cases are analyzed in the Appendix to this Reply Brief.

5/ Respondent asks which "statutes allow an aider and abettor to be convicted of a capital offense, even though intent to murder either has not been or cannot be proved." Resp. Br. 43 n.8. By looking

the wrong answer.[6/]

Respondent is similarly remiss in reporting the progress of death penalty

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5/ continued

solely at provisions defining the crime of capital murder, respondent simply misses the fact that: (1) several States include a requirement that the felony-murder defendant have taken life, or have intended to do so, in the aggravating or mitigating circumstance portions of their capital-sentencing statutes (see the United States, Arkansas, Colorado, Illinois, Indiana, New Mexico and North Carolina provisions cited in Petr. Br. 28-29 nn.43-40); and (2) several States do not even include felony-murder as an aggravating circumstance that will justify imposition of the death penalty (see the Arizona, Idaho, Montana, Nevada, Oklahoma, and South Dakota statutes cited in Petr. Br. 29 n. 45).

6/ Contrary to Respondent's assertion, six statutes it cites (Arkansas, Delaware, Kentucky, Texas, Utah, and Washington), do include mens rea requirements in setting forth those types of murder or felony-murder that are capital. Those requirements are all quoted in Petitioner's Opening Brief at page 28 n.43. (Respondent's citation of a Washington statute that was recently ruled unconstitutional and later reenacted in a different form accounts for

legislation presently being considered in the United States Senate. Although it is true that Senate Bill 114 originally "would [have] authorize[d] the imposition of the death penalty for a number of federal felonies in which death results, even if there is no finding that the defendant either committed the crime with the conscious purpose of causing death or participated in the homicidal act," Resp. Br. 23, Senator Thurmond's Judiciary Committee amended the bill before reporting favorably upon it. The amendment requires that every death sentence be supported by a finding that the defendant either "intentionally killed," "intentionally inflicted serious

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6/ continued

one of these errors. See Petr. Br. 28 n.43.) The Oregon death-penalty statute cited by respondent was ruled unconstitutional in 1981, State v. Quinn, 623 P. 2d 630 (Ore. 1981), and Oregon remains without a death penalty at this time.

bodily injury," or "intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person,...and the victim did die as a direct result of the act." S. Rep. 143, 143, 97th Cong., 1st Sess. 33 (1981) (emphasis added). The Committee concluded that this requirement of "a high level of culpable involvement in the homicide" was necessary "to meet constitutional difficulties under Coker v. Georgia." Id. at 5.

Respondent's most remarkable misstatement of petitioner's constitutional contentions is its assertion that the "next step" following acceptance of those contentions "would be an attack upon capital punishment for those who planned death but did not actually commit the killing." Resp. Br. 55-56. Petitioner's argument that a death sentence is unconstitutional (either on the facts of this particular case or in gen-

eral) in the absence of an intent to take human life obviously does not look to immunizing persons who deliberately hire or solicit others to kill for them. It looks 180 degrees in the opposite direction.

B. Respondent Misconceives the Application of Petitioner's Contentions to Florida's Capital-Sentencing Statute

Respondent's asserted justifications for inflicting the death penalty in cases of accessorial liability for unintended homicides occurring during a felony involve similar misconceptions of petitioner's contentions, as well as complementary misconceptions of the Florida death-penalty statute.

First, respondent asserts that "[j]udicial acceptance of [petitioner's position] ... would be tantamount to the issuance of 'death warrants' for innumerable convenience store clerks and service

station operators" (Resp. Br. 61) whom robbers would thereby be licensed to kill "in order to prevent subsequent identification by the victim" (Resp. Br. 60 n.12; see also Resp. Br. 8-9). Of course nothing in any of petitioner's contentions would forbid death sentences in such cases as respondent describes which are all, by express ("witness elimination") hypothesis, intentional killings. Nor would any prosecutor have any difficulty in convincing the trier of fact to infer such an intent to kill in any case where the facts supported the inference -- as, indeed, occurred in the only two actual cases cited in this context by respondent. (See the analysis of the Vaught and Hargrave cases in the Appendix, infra.)[7/]

7/ Respondent goes so far as to say that a robber in Florida "has ... nothing to lose by murdering the victim" unless he

But the Florida statute does not require a finding of intent to kill or to "eliminate witnesses" (see Resp. Br. 9) as the condition of a death sentence for accessorial felony-murder, and the facts of petitioner's case will support no such finding. To the contrary, the Florida Supreme Court found that the killings here were the "spontaneous" actions of petitioner's robbery accomplice, Sampson Armstrong, undertaken in petitioner's absence after one of the robbery victims

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7/ continued

faces the death penalty. Resp. Br. 60. This assertion is absurd. In Florida, as elsewhere in the United States, the penalty for murder is greater than the penalty for robbery. Compare Fla. Stat. Ann. §§ 775.082, 813.13, 947.16 (first-degree murderer not sentenced to die must receive a life sentence without possibility of parole for 25 years; robber who does not kill may be sentenced to any term of years from 0 to life, and may be paroled at any time after one year.)

opened fire on Armstrong and his wife. A. 55; 399 So. 2d at 1373, incorporating Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981).

Both respondent's "creation of risk" (Resp. Br. 39-47) and "deterrence" (Resp. Br. 48-63, especially 60-63) justifications also defend a Florida statute that does not exist. These arguments expressly justify the death penalty for the underlying felony, not for a killing that "spontaneously" occurs during its commission. If they were valid arguments, Coker v. Georgia could not have been decided as it was, since rape no less than robbery is, and has been determined by "numerous state legislatures [to be,] ... so dangerous that death is a forseeable and likely result of participation in that conduct." Resp. Br. 43-44.

The Florida statute under which petitioner stands condemned to die does not

require a finding of foreseeability of death -- let alone a finding that "loaded firearms are used" in the underlying felony, Resp. Br. 42. To the extent that it expresses a generic finding of the life-endangering character of all enumerated felonies, that finding no more justifies the death penalty for Earl Enmund than for Ehrlich Coker. See Petr. Br. 7-10.

Respondent plays the operation of the Florida statute false in yet another critical regard. Under that statute, respondent says, "[i]n practice, a death sentence for an aider and abettor will only be imposed in extreme cases where the defendant's involvement is major." Resp. Br. 46-47. Petitioner's death sentence suffices to refute this glib assertion. Nowhere in its brief does respondent tell us what "extreme cases" means or undertake to demonstrate that petitioner's is one of

them. Respondent does argue that petitioner's involvement in the robbery, not the murder "was major," but this, again, is a justification for punishing the robbery, not the murder, with death. And in any event, respondent arrives at even this insufficient justification by disregarding -- and in some cases misrepresenting -- the record, to which we next turn.

C. Respondent Misstates the Facts and Prior Proceedings of Record

Page limitations required the omission of a detailed statement of the facts from petitioner's initial brief. Consequently, respondent has charged that "[p]etitioner's statement of the case omits material facts" (Resp. Br. 1) and has exploited this omission by offering a grossly incomplete and slanted version of the record. We now set the record straight.

1. The evidence at the guilt-innocence phase

The following evidence was presented at the first phase of petitioner's bifurcated jury trial:

At 7:45 a.m. on April 1, 1975, Harold Elems was working on his property in a rural portion of Hardee County, Florida, when he heard "[w]hat appeared to be gunfire ... ," R. 1043, i.e., "more than six but not fifteen" shots fired "in a short length of time." R. 1044. Although he could not then see the nearby Kersey home, a minute or two later he drove his truck to within 100 yards of the back of that house, of which he had "a pretty clear view ... for probably a minute or so." R. 1044-45. Seeing nothing unusual, Mr. Elems drove on, arriving at his destination, several minutes away, at precisely 7:50 a.m. R. 1045-47. He testified that as of

approximately 7:47 a.m. he noticed no cars on or near the road in front of the Kersey property. R. 1047.

The bodies of Thomas and Eunice Kersey were discovered between 7:55 and 8:00 a.m., on April 1. They were lying head to head, partially in the kitchen and partially across the rear doorway. R. 1019-21, 1056, 1070. Mr. Kersey had been shot twice, his wife six times. R. 1102, 1106. No weapons were discovered at the scene or introduced at trial, R. 1567, although a ballistics expert testified that bullets had been fired from a .22 and a .38 caliber weapon. R. 1055-57, 1139-41.

The police were unable to locate Mr. Kersey's wallet (R. 1084-85), although testimony at trial indicated that he kept it on his person at all times. The night before he was shot, Mr. Kersey told his son that he had $1,400 or $1,500 in his

wallet. R. 1013-14.[8/]

The State relied almost exclusively on the testimony of Jay B. Neal, a close friend of Sampson Armstrong, for a description of the events at the Kersey residence on the morning of April 1, 1975. R. 1345. According to Neal, Armstrong told him "about a job" he and his wife Jeanette Armstrong "had done," during which an "old lady shot Jeanette." R. 1347-48. Sampson told Neal that he and his wife went to the door of a ranch house owned by "two old persons" and asked for some water because their "car had run hot." R. 1348. When the man went behind his house to get a water jug, Sampson "grabbed the old man ... around the neck and put the

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8/ According to several witnesses, Mr. Kersey usually carried large sums of money in $100 denominations in his wallet and liked "to flash his money around," not only among friends and at church, but also to strangers. R. 993, 1005-06, 1010.

gun on him ... holding him to the back door like." R. 1349. According to Neal, Sampson then said that:

> He was telling Jeanette to get the money. And somehow or other the old man hollered for his wife and his wife heard the scream and he could look through the back window and see the old lady coming around the house with the gun.... As soon as she got there she shot and hit Jeanette and he hit the old man and knocked him down and shot the lady.... By the time he shot the lady and the old man got up and he shot the old man in the chest.... Then he say he took them in the house and put them head by head ... [and] left ....
> 9/

R. 1350-51.

9/ Police testimony established that Jeanette Armstrong was admitted to a local hospital with a gunshot wound on April 1, 1975, and that a blood sample taken from her matched a blood stain found inside the Kersey home, which did not match either victim's blood. R. 1057, 1070-71, 1125-30, 1157.

[Footnote 9/ continues on next page.]

Contrary to respondent's false assertion that "Armstrong had told [Jay B. Neal] that he, petitioner, and Armstrong's wife had robbed and killed an elderly couple," Resp. Br. 3, Neal did not implicate petitioner in any way. Indeed, as the Florida Supreme Court noted on appeal, Neal's account "did not include any reference to [petitioner]." A. 49; 399 So. 2d at 1270. Nor did the crime-scene evidence implicate petitioner in either the robbery or the

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9/ continued

Jeanette Armstrong's mother, Ida Jean Shaw, also corroborated Neal's testimony in several respects. Ms. Shaw testified that her daughter confessed to her about "a robbery," R. 1190, 1196, and that Sampson Armstrong told her that he had $600 left "out of the robbery." R. 1197; see also R. 1195-96, 1202, 1246-47. According to Shaw, Sampson also told her "he made sure that the people was dead." R. 1207-08. Finally, Ms. Shaw testified that she saw either Jeanette Armstrong or Sampson Armstrong with a .38 caliber weapon sometime before April 1, 1975. R. 1200-01.

shootings that began when Mrs. Kersey fired on Jeanette Armstrong.

The only evidence linking petitioner to the robbery falls into three categories:

(i) Sometime during the early part of March, 1975, petitioner and two acquaintances stopped at Mr. Kersey's house to buy a calf that Mr. Kersey had advertised for sale. Upon receipt of the purchase money, Mr. Kersey displayed the contents of his wallet to all present, precipitating a discussion among the four men about "the money this man's got." R. 997-1000.

(ii) The State introduced the testimony of Willie Lee, a neighbor of petitioner, who was standing on the road outside his house on April 1, 1975 for several hours waiting for a ride that never came. R. 1298, 1302. As summarized by the Florida Supreme Court, Lee

> said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town. ... At about 8:00 o'clock, the car came back travelling "pretty fast" ..., with [petitioner] ... driving, Ida Jean Shaw in the front seat, and one of the two other people in the car lying down across the back seat.

A. 37; 399 So. 2d at 1364-65; see R. 1300-04. Lee testified that the male and female occupants of the back seat were "younger" and black, as are Sampson and Jeanette Armstrong. R. 1301, 1307-08, 1323.

The State also introduced the testimony of Mary Alice Gibbs and Robert Clark Davis, who drove past the Kerseys' home at around 7:35 on the morning of April 1. Both saw a yellow or cream-colored car

just off to the right (east) side of Route 62, about 200 yards west of the Kersey residence, and both saw "one person in the car under the [steering] wheel." R. 1025, 1026, 1028, 1037, 1039. The only positive description of that person at trial was Mrs. Gibbs' statement that she saw "a black male in the car."[10/] The Florida Supreme Court concluded that Mrs. Gibbs' testimony was the "only evidence," albeit "inferen-[tial]" evidence, that placed petitioner in the vicinity of the Kersey home when Sampson and Jeanette Armstrong robbed and killed its occupants. A. 49-50; 399 So. 2d at 1370.

10/ Mrs. Gibbs testified that the car "had an 18 tag." R. 1026. Other testimony revealed that Ida Jean Shaw's yellow Buick had "an 18 tag." R. 1094-95. Contrary to respondent's assertion that "Petitioner was seen in a car near the scene of the murders," Resp. Br. 2, neither Mrs. Gibbs nor Mr. Davis could identify petitioner as the person she or he saw in a car near the Kersey home. R. 1038, 1039.

(iii) The third category of evidence touching on petitioner consisted of the testimony of Ida Jean Shaw.11/ First,

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11/ The prosecutor conceded to the jury that Ms. Shaw was herself a suspect in the Kersey affair. R. 1568. At trial, she repeatedly admitted actions that implicated her as at least an accessory after the fact. See A. 39-40; 399 So. 2d at 1365-66; R. 1213-14, 1232, 1238-39, 1249.

Ms. Shaw admittedly gave a number of inconsistent stories under oath before trial. A. 43; 399 So. 2d at 1367; see, e.g., R. 1208-09, 1225-26, 1233-35, 1257-59. As a result, she spent thirteen days in jail before trial on charges of perjury and was released by the State only after she agreed to repudiate certain prior sworn statements in which she exonerated petitioner and inculpated her daughter and two companions in the robbery and shooting. R. 272-74, 280-81, 1178-80, 1259, 1261, 1572. Ms. Shaw was called as a witness by the court because of her "hostility" to the State, and testified under a grant of immunity by the State from prosecution for murder, robbery and perjury. R. 103-06, 274, 281-82, 429-30, 1178-80, 1251-52. At trial, she admitted to having perjured herself again during the court's direct examination. Compare R. 1194, 1196 and R. 1205. As she summed it up: "Sometimes I just lie because I can." R. 1222. The version of Ms. Shaw's testimony reported here is the most damaging to petitioner.

Ms. Shaw testified that at about 7:55 a.m. on April 1, 1975, she was in the wash house when either Sampson or petitioner -- she could not remember which--informed her that Jeanette had been shot. R. 1187, 1188, 1212, 1224. Ten minutes earlier, the Armstrongs and petitioner had been gone, R. 1185-86, and Ms. Shaw testified that she did not "have any reason to believe that Jeanette, Earl and Sampson did not return together." R. 1212.

Next, Ms. Shaw testified that, while riding in a car with petitioner later that day, after Jeanette had confessed the robbery to her, she asked petitioner "[w]hy he did it," and he responded "that he had seed the man with money ... the time he ... went out there to buy a cow." R. 1205-06. When asked if she remembered at any time talking to petitioner about "whether he was inside that house or not,"

she answered, "No, because Jeanette had told me." R. 1206-07.[12/]

Finally, Ms. Shaw testified that, for a couple of days after April 1, 1975, petitioner hid either two or three guns in the loft of his house, and thereafter "Sampson and Earl" instructed Shaw "to get rid of all the guns." R. 1199-1200, 1201-02, 1231-32. She did so, first by burying them in her garden, and later by giving them to a friend in "a bucket of greens" with instructions "to get rid of [them]..," which he did. R. 1200, 1201-02, 1213, 1232, 1272-77.

* * *

12/ Jeanette Armstrong was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life terms. See A. 51; 399 So. 2d at 1371. Her confessions to the police and to Ms. Shaw, stating that petitioner remained outside in the car during the robbery, are discussed in nn. 15-16, infra.

During petitioner's case, he admitted purchasing a cow from Mr. Kersey in March, but denied any knowledge of the robbery and shooting. R. 1500, 1509-11. He gave a minute-by-minute account of his activities on and around his farm on April 1, 1975. R. 1475-83.

Petitioner testified that he is a forty-three-year-old, partially disabled veteran with four children, ages one to eleven. R. 1467-68. He described his well-established ties to the community (including his ownership of a home and orchard) and his longstanding employment as a contract hauler and picking-crew chief. R. 1467-70.[13/]

13/ Fla. Stat. Ann. § 921.141(3) required the trial court to consider this mitigating evidence introduced at the guilt-innocence phase in passing sentence on petitioner. At the penalty phase, petitioner's counsel also argued that "very definite mitigating

In closing argument, the prosecutor acknowledged that the State's case did not provide "a clear and complete and accurate picture of what went on." R. 1558-59. In his view, however, the evidence demonstrated that "Jeanette Armstrong was there and that she got shot by Mrs. Kersey;" that "Sampson Armstrong killed the old people;" and that petitioner "was in that car between those two times." R. 1576-77.

Following the State's request for a "principal and accessory" instruction (R.

13/ continued

circumstance[s]" were present, including (1) the absence of any evidence "that Earl Enmund was at the house at the time of the shooting," and (2) that the killings were not "anticipated," but were the result of a "spontaneous gunfight" between the Armstrongs and the Kerseys which petitioner "could not be associated with." R. 1683-85. Respondent grossly misrepresents the record in asserting that petitioner "failed to present or proffer any evidence at all in mitigation." Resp. Br. 67 (emphasis in original).

1395, 1553), the trial judge twice charged the jury[14/] that "[t]he killing of a human being while engaged in the perpetration of ... robbery is murder in the first degree even though there is no premeditated design or intent to kill," and that the defendant could be convicted of first-degree murder if "the deceased was killed by ... someone acting in consort [sic] with the defendant." A. 6, 8, 15, 17. The jury subsequently announced identical verdicts as to Sampson Armstrong and petitioner: guilty of two counts of first-degree murder and one count of robbery. R. 1639, 1643, 1644-49.

2. The sentencing proceedings

At the sentencing phase of the trial,

14/ Three hours after the jury retired to deliberate the foreman requested, and the trial court provided, further instructions "[o]n the difference between first degree and second degree" murder. A. 13-19.

the State's only witness was Hardee County Sheriff Newton Murdock who testified that, because the two victims were advanced in years and a number of shots were fired, "this is the worse homicide I have been to involving two people." R. 1658-59. The State also introduced a judgment order showing that petitioner had been convicted in 1957 of robbery and sentenced to one year in jail. R. 1667; State's Sentencing Exhibit, No. 1.

In his closing argument on sentence, the prosecutor conceded that Sampson Armstrong was the "triggerman." He argued, however, that petitioner was "just as guilty as the triggerman," whether or not he "set foot inside that house," because he "set it all up ... [and] drove them there." R. 1679-80.

The trial judge directed the jurors to "determine by a majority vote whether or

not you advise the imposition of the death penalty" based upon "one, whether sufficient aggravating circumstances as hereafter enumerated existed to justify the death penalty; [and] two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist ...." A. 19. The instructions did not require the jury to find, as a precondition to imposition of the death penalty, that the defendant intended to take life, actually participated in a homicidal act, or was present when the homicide occurred.

The jury recommended imposing the death penalty on both defendants. A. 23-24; R. 1690-91. The trial court immediately sentenced petitioner and Sampson Armstrong to die on both counts of murder.[15/]

15/ Although the trial court heard no further evidence before reaching this

A. 27-28; R. 1698, 1701. In oral remarks prefacing petitioner's death sentence, the court found four aggravating circumstances in the case: "this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of ... a robbery; this capital felony was committed while the Defendant was engaged

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15/ continued

conclusion, it had an additional source of information before it that had not been introduced at trial: the full text of the sworn pretrial statements of Ida Jean Shaw. R. 283; see R. 1700. According to Ms. Shaw's statements: (1) Jeanette Armstrong told her that "We went out there to rob them, but weren't intending to have no shooting," May 5, 1975 statement, at p. 18, and that "we didn't know the man had a wife and he hollered and told his wife to bring the gun, and ... she started shooting and the bullet hit [Jeanette]," Aug. 19, 1975 statement, at p. 11; (2) Sampson Armstrong told her that "we went to rob them and had to kill them," May 5, 1975 statement, at p. 18; and (3) petitioner told her that "he took them out there and stayed in the car" and that he "was ... in the car the whole time," Aug. 19, 1975 statement, at pp. 18-19.

in or was an accomplice in the commission of ... a robbery; this capital felony was committed for pecuniary gain[;] ... this capital felony was especially heinous, atrocious, or cruel[; and] this Defendant ... had previously been convicted of a felony involving the use or threat of use of violence to a person." A. 28. The court found "no mitigating circumstances." A. 28.[16/]

16/ In both its oral sentencing opinions and its subsequent written findings (see the following paragraph of text), the trial court expressly stated that it was relying upon "the background of this Defendant based on the Court's participation in this trial and of [sic] the [separate] trial of one Jeanette Armstrong." A. 27, 31; see also R. 1697. Jeanette Armstrong's trial differed from petitioner's in that Jeanette Armstrong's written confession and portions of a transcript of tape-recorded admissions made by her just prior to her written statement (R. 298-355), were introduced at her trial, but not at petitioner's. R. 259-65, 328-29. The trial judge relied on these statements in sentencing petitioner even though, at a

The trial court did not file written findings of fact in support of the capital sentence -- as required by Fla. Stat. Ann. § 921.141 -- until nineteen months after petitioner's trial, when the Supreme Court of Florida ordered written findings in connection with petitioner's appeal. A. 29. The court again concluded that the four aggravating circumstances enumerated

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16/ continued

joint pretrial hearing, he forbade counsel for petitioner to cross-examine Ms. Armstrong concerning the statements, "because her confession would not be admissible in trial against your client." R. 328-29. Because the trial court considered Ms. Armstrong's statements, we note here that she told the police that Sampson and Jeanette Armstrong, alone, went up to the Kerseys' house because petitioner "wouldn't go no further. He stayed in the car." According to Jeanette, when she and Sampson were taking Mr. Kersey's wallet at gunpoint, Mr. Kersey called out to his wife to "shoot the nigger," and Mrs. Kersey thereupon fired "the first shot," striking Jeanette. State's Ex. 3, Aug. 11, 1975 (see R. 313, 354-55).

above were present in petitioner's case, and that "none of the statutory mitigating circumstances applied to this defendant."[17/] A. 30-32 (emphasis in original).

In support of its finding that the capital felony in petitioner's case was "especially heinous, atrocious or cruel," the trial court stated that the killing of Mr. and Mrs. Kersey "was not a spontaneous matter," but was done for the "purpose ... of eliminat[ing] ... witnesses to armed robbery." A. 30. The judge also stated that it was "reasonable to conclude, and

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17/ As in its instructions to the jury at the sentencing phase of the trial, in which the jury was told that the only mitigating circumstances it was to consider were those "hereafter enumerated" -- i.e., the seven specific circumstances enumerated "by Statute" -- A. 19-21, the trial court confined its discussion of mitigating circumstances exclusively to the seven "statutory" circumstances in Fla. Stat. Ann. § 921.141(6). A. 32.

the court so finds, that the defendant Enmund and the defendant Sampson Armstrong each fired into the bodies of Mr. and Mrs. Kersey." A. 31. However, in its findings directed to the "minor participation" mitigating circumstance of Fla. Stat. Ann. § 921.141(6)(d), the trial court abandoned the above-quoted statement and instead characterized petitioner as an "accomplice to the capital felony," whose participation was limited to before-the-fact planning of the robbery and the after-the-fact disposal of weapons. A. 32.

3. Proceedings on appeal

On appeal, the Supreme Court of Florida rejected the trial court's findings insofar as they assigned petitioner any role in the shooting of Mr. and Mrs.

Kersey.[18/] The Supreme Court expressly upheld petitioner's conviction of first-

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18/ The trial court based its conclusion that petitioner participated in the shooting on three factual premises: that both Kerseys were shot while in a "prone position;" that Jeanette Armstrong had previously "sustained serious wounds;" and that "different caliber guns" were used to kill the Kerseys. The first two premises are simply incorrect. As the Florida Supreme Court noted, the pathologist testified that "there is really no way [he] could determine the positions" of the victims when shot. A. 36; 399 So. 2d at 1364. The Court accordingly concluded that the evidence at trial "as to the direction of fire and the position of the victims when shot [was] ... equivocal at best." A. 55, 399 So. 2d at 1373, incorporating Armstrong v. State, supra, 399 So. 2d at 963; see also R. 1104-05, 1112, 1114. And there was no testimony at petitioner's trial concerning the severity of Jeanette Armstrong's wound.

More fundamentally, none of the trial judge's factual premises, even were they correct, contradict Sampson and Jeanette Armstrongs' separate admissions to both Jay B. Neal and Ida Jean Shaw that they alone went to the Kerseys home, or Sampson Armstrong's separate admissions to both Jay B. Neal and Ida Jean Shaw that he alone killed the victims after Mrs. Kersey fired on Jeanette. See Brief for Petitioner at 52 n.69.

degree murder and his sentence of death solely on a theory of accessorial liability based upon his participation in a robbery during which, and outside of petitioner's actual presence, Sampson Armstrong killed the Kerseys. The court found that "the only evidence of the degree of [Earl Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes." It nonetheless concluded that this evidence

> was sufficient to find that the appellant was a principal of the second degree, constructively present [19/] aiding and abetting the commission

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19/ According to the court, one is "constructively present" if he does not commit the robbery "with his own hands" but is "'sufficiently near and so situated as to abet or encourage, or render assistance to the actual perpetrator in committing the felonious act or in escaping after its commission.'" A. 49; 399 So. 2d at 1370 (emphasis added).

> of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of [Fla. Stat. Ann.] section 782.04 (1)(a).

A. 49-50; 399 So. 2d at 1370 (emphasis added).

Further, the Supreme Court expressly disapproved two of the four aggravating circumstances on which the trial court had relied. The court first held that the "pecuniary gain" circumstance could not be relied upon in addition to the robbery-murder aggravating circumstance. A. 55; 399 So. 2d at 1373. It then rejected the trial court's conclusion that the capital felony was "especially heinous, atrocious or cruel," together with the factual findings on which that conclusion had rested. It found that "the shootings were ... spontaneous and were precipitated by the armed resistance of Mrs. Kersey,"

and that "[i]t simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them." A. 55; 339 So. 2d at 1373, incorporating Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981).

Despite its repudiation of two of the trial court's aggravating-circumstance conclusions and several of the trial court's factual predicates for petitioner's sentence of death, the Supreme Court upheld that sentence on the ground that there were two remaining aggravating circumstances (the commission of a homicide "in the course of a robbery," and petitioner's "previous conviction of a violent felony" -- the 1957 robbery for which he received a one-year sentence) and, in the court's view, no mitigating circumstances. A. 55;

399 So. 2d at 1373.[20/]

Finally, the Supreme Court of Florida rejected petitioner's claim that "the trial court erred in sentencing appellant to death where the evidence failed to show he actually caused the death of the victims, or intended to cause their death, and at best showed appellant minimally involved in the felony-murder." Supplemental Brief of Appellant, at 7-12. The Court held:

> Appellant contends that since the evidence does not establish that he intended to take life the death penalty is impermissible under the eighth amendment ban on cruel

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20/ Justice Overton dissented. In his opinion, the court's "finding" that petitioner "did not actually participate in the shooting" so substantially undermined the trial court's premise for sentencing petitioner to die -- i.e., that petitioner "was present and assisted in the commission of the murder" -- that resentencing was necessary. A. 56; 399 So. 2d at 1373. See Petr. Br. 53.

> and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

A. 51; 399 So. 2d at 1371.

CONCLUSION

On this record, petitioner's death sentence cannot constitutionally be sustained. The judgment of the Supreme Court of Florida, insofar as it leaves the sentence of death undisturbed, should be reversed.

Respectfully submitted,

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